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THE DOCTRINE OF STARE DECISIS*

I am requested to present a paper whose theme is suggested by the Present Problems of Private Law, as distinguished from law that has a constitutional or international aspect. I doubt whether there is any other section of the Congress whose themes are so difficult to select. We cover, indeed, those branches that mainly concern the ordinary, plain, steady-going, stay-at-home, law-abiding citizen,—that multitude of questions among which most legal practitioners everywhere are wearing out their lives, working every day and all day upon Present Problems of Private Law. Each of those problems interests the parties to the particular litigation or negotiation or dispute or difficulty which brings it up. Some interest even the lawyers to whom they are presented. Few interest anybody else; and even among these few but a small minority possess such worldwide interest that they are worthy of the consideration of a Congress representing all the civilized nations of the globe.

Furthermore, this is not an International Congress of Lawyers. There is such a Congress; but it is a different one, and does not meet until next week. This is a Congress of Arts and Science; and of all the Present Problems of Private Law none is so difficult as to give to any portion of Private Law, as known at least to the American practitioner, the semblance either of a Science or of an Art.

Science, as I understand it, is a search after absolute truth—after something which when once ascertained is of equal interest to all thinkers of all nations. No matter how wise and learned and famous a person may have said that a thing is so in the realm of science, it remains open to anybody to prove that it is not so; and if it is proved to be not so, the authority of the wise and learned and famous

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person disappears like a morning mist. In science, what we are really seeking is not the opinion or the command of any human being. We are subject to no command, and are not bound to follow any previously expressed opinion. But when a lawyer is trying to find out what is the law upon any particular point, in order to advise his client, he first inquires whether a collection of men exercising legislative functions and having jurisdiction in the premises have commanded anything upon the subject; and if they have, he has nothing to do but to interpret, if he can, the usually vague and unscientific language in which their command has been couched. If he cannot find any such command among the books of statutes and ordinances—in other words, if the subject has not been legislated upon—then usually under present conditions the American lawyer's task is not to ascertain by what rules human beings should be governed in the absence of legislation, but by what rules certain persons of authority have in the past said that they should be governed; the authority of these persons not arising from any transcendent wisdom or learning of their own, but mainly from the fact that they had been theretofore elected or appointed to a certain public office.

Nor is it easy to consider any theme suggested by Present Problems of Private Law in the light of an art. The presentation of any given case to a judicial tribunal involves the knowledge and application of Art as well as of Science. If literature and rhetoric are arts, and psychology is a science, there is high art in presenting the facts of the case, and the true application of the law thereto, in such a blaze of light that they will remain indelible in memory. There is still higher art in so presenting them that something other than the truth may thus reach the judicial mind; for in the practice of the law the highest degree of artistic skill is to conceal the truth, not to exhibit it. But in the body of the law itself, as known in America at least, as it is developed out of the work of legislative committees or litigating counsel, and is verified by the signature of governors or presidents, or enunciated by judges, the artistic element is rarely to be found.

Among the problems common to the whole world which have been bequeathed to us by forces peculiar to the century just closed, probably those will first come to mind which are the result of economic progress; changes desirable in the law of corporations, in the law regulating the relations of capital and labor, and in the law of transportation. These, however, belong more to the realm of sociology and political economy than to that of law. We can advise the experts of those sections as to what the old law is, what changes can be made in any given State or country without violating its

particular constitution, how its constitution can be changed if a change be desirable, and in what verbiage the desired changes should be couched, so that they may be effective; but as to what the substance of the changes should be, this section of the Congress is not the one most appropriate for a discussion.

Other problems arise from the close communion into which the various peoples of the earth have been brought by the quickening and cheapening of transportation, mixing them together by intermigration, by intermarriage, by foreign stockholdership, bondholdership, and other property ownership, and in so many other ways. But these problems, as practical problems of the present generation, belong rather to the section of Private International Law than to ours.

I believe, however, that there is one problem brought daily to the attention of the practising American lawyer that while of ancient origin is now fast coming to the acute stage, and to the verge of radical treatment, which belongs peculiarly to the law itself, without any adverse claim on behalf of the Professors of Ethics or Sociology or Political Science. I refer to the problem as to how the law itself should be authoritatively declared and evidenced.

It is a familiar fact that in every English speaking community the body of the law is divided into two portions: first, the so-called judgemade law, which is to be found in records and reports of the decisions and sayings of judicial officers; and second, the statute law, which consists of enactments by Parliaments, Congresses or Legislatures, together with executive regulations and municipal ordinances adopted under powers lawfully delegated by legislative authority. According to the theory of English jurisprudence, the so-called judgemade law was not made by the judges at all, but existed, although not written, as the ancient and general custom of the English speaking people, and in the shape of ethical rules which they had tacitly recognized and adopted; but the authoritative evidence of such a custom was the decision of a court, and by the doctrine of *stare decisis* such a decision when once made became conclusive evidence—conclusive within the territorial jurisdiction of the court until overruled by some higher tribunal—conclusively establishing the existence of some rule which thereafter could not be changed except by legislative enactment.

This judgemade law has been called by its admirers the perfection of human reason; and theoretically there is no other method equally efficacious of finding out what is the true rule of law applicable to any given state of things. It may be well to analyze the theory of judgemade law and recall to mind the reason why it is theoretic-

ally superior to the work of the wisest legal philosopher, in order that we may realize more clearly why the theory is becoming less and less justified by the practical results, and why, as a result to some extent of the rapid growth of the English speaking world in the nineteenth century and of the rapidly increasing complexity of our civilization, and to some extent of mere lapse of time, it is weakening, and showing signs of an early breakdown unless at least some radical remedy is adopted.

The theory of judgemade law—the theory underlying the system by which the decision of a court in a litigated case becomes the highest evidence and conclusive evidence of the existence of a previously unwritten rule of law—involves in the first place the assumption that the case is a genuine controversy, involving two or more parties litigant, each determined to use every effort to win. It involves the assumption that each of these parties litigant is represented by counsel learned in the law, skilled in its exposition, and having—through compensation, or the hope of it, or charity, or that love of a fight which is inherent in the human race—sufficient interest in the outcome of the litigation to call forth their best efforts. It involves the assumption that these counsel have familiarized themselves with the statutes, the judicial precedents, and the general principles of law, public policy and ethics which are applicable to the controversy, and that each has reduced his view of the case to clear and logical form. It involves the assumption that they come before an able, experienced and impartial judge or bench of judges. It involves the assumption that each judge listens to each side until the case has received all of the oral argument which it properly requires, elucidating by questions any matter that may have been left obscure or in ellipsis by counsel. It involves the assumption that each judge is already familiar with the previous statutes and judicial precedents that are applicable to the case, or else that during the course of the argument, or by subsequent examination of the books, he familiarizes himself therewith. When these assumptions are all warranted by the actual facts, it is evident that after counsel have exhausted all possible effort to present the various points of view, and the judge has supplemented their work by means of his own experience and independent research—and especially if he be sitting in the highest appellate tribunal, with the benefit of the repeated re-examination and sifting of argument in the courts below, and of the light inevitably thrown upon a litigation which has been pending during a long series of years by reasonings and analogies such as are sure to come from time to time to the attention of counsel whose minds have become impregnated with the case, or to be con-

tributed as fresh minds take it up upon the substitution of one counsel for another—then he is better equipped to declare the correct application of established principles to the particular case before him, and better equipped to apply general reasonings and analogies to a case of new impression, than can be any closet student. The different method and the different point of view of the legal textwriter or philosopher are indeed invaluable in contributing to the elucidation of unsettled problems; but, from the necessary limitations of the human mind, no legal reasoning can be regarded as having passed the final test until it has been subjected to the practical analysis of an actual litigation.

The judge having thus made his decision, he very commonly states orally or in the form of a written opinion his reasons therefor. It is assumed that if this decision is preserved at all, and is brought up for future use as a precedent, the facts before the court and the process of reasoning by which the result was reached are accurately known. It is assumed either that they are accurately reported in some book or periodical, or that they have been completely incorporated in the record of the case. The precise point decided by the judge is thereafter in theory recognized as a part of the general body of the law of the state, colony or nation whose judicial officer he is. Theoretically it remains conclusive evidence until overruled or repealed, or unless it is found to be in conflict with another decision of equal authority, in which case, with the benefit of all the work done in the two litigations represented by the conflicting decisions, the question is submitted to a further and final test whenever it may again arise. The reasoning in the opinion of the court is not conclusive evidence of the law except so far as it is necessary to the precise point decided, because so far as it is not thus necessary the judge is not presumed to have had the full benefit of the research and arguments of counsel, or to have given to his own reasoning and use of language the same degree of attention. His unnecessary reasoning therefore receives in the English law and American courts the same weight only which is awarded to all judicial decisions in other systems of law if I correctly understand them—namely, that which belongs to the opinion of an able and learned professor or textwriter, which is to be considered with care and respect, but not necessarily to be followed. Hence the so-called syllabus, or abstract prefixed to every modern printed report of a judicial decision when properly drawn up, is very often composed of two parts: first, a statement of the precise point decided, with so much of the facts and reasoning, and so much only, as is necessary to make clear that decision; and second, propositions laid down, as

we say, *obiter,* which might have been omitted without creating an ellipsis in the train of argument by which the actual result of the case was reached.

This is the theory which causes the English and American lawyer to give greater weight to an appellate decision delivered by Lord Mansfield after argument by such counsel as Dunning and Law—to one delivered by John Marshall after argument by Webster and Wheaton or Pinkney—than to the work of any philosopher; why he would give comparatively little weight to any reasoning of Mansfield or Marshall himself in a case that went by default, or where the reasoning was unnecessary to the decision; and why he has grown up and lives with the belief that his Continental brother is deprived of the most valuable instrument for the attainment of perfection.

It is evident that there was always some danger of defective application of the theory of judgemade law to the circumstances of the particular case—a little danger of the submission of a collusive controversy and a serious danger that the counsel might be incompetent or careless, the judge mediocre or wanting experience, the argument or submission of the case insufficient, the court's opinion obscurely or defectively expressed, the decision inaccurately reported. There was also the danger arising from the proverbial fact that hard cases make bad law, so that a doctrine occasionally becomes established because it did equity between the parties whose dispute first suggested its consideration, although in nine cases out of ten thereafter its application may be practically oppressive as well as theoretically indefensible. During some generations of lawyers and judges, however, the practical results approach the theoretical standard to a degree which could hardly perhaps have been expected—so nearly that the theoretical perfection of "case law" was almost a fetich with the legal profession, and that an overwhelming majority of the profession is still determinedly opposed to any change.

Yet I believe not only that the doctrine of *stare decisis,* unless some entirely novel and radical legislation can be devised to save it, must disappear through the inevitable course of human progress—and progress does not always lead from a worse to a better system—but that its hold, in the more crowded Federal and State courts at least, has already to a considerable extent been weakened. It is increasingly common to hear active and successful practitioners in those tribunals say that they find less attention given now to precedent than formerly; that when a litigation comes before a court of last resort which perceives or thinks that it perceives the right to be on one side, they find an increasing tendency to disre-

gard, or to distinguish upon some trivial ground, any precedent to the contrary; that they find less and less discrimination between general statements of law contained in a former judicial opinion and the actual point that was decided, in other words between what may have been *obiter* in the opinion and what was really settled thereby; that they find increasing weight attributed to general statements of the law in text-books and encyclopedias, even in works fresh from the press, photographs of whose authors, were they exhibited to the court, might suggest the very recent law school graduate. These things are generally spoken of among lawyers by way of complaint, as if we were living in a temporary era of carelessness, due to an overcrowding of the court calendars, or to an imperfect manner of selecting the judges, or to a slovenly habit of presenting cases to the court, which should and will be corrected in the future. I think, however, that the change is not temporary but permanent; that it is the effect of forces which are permanent and beyond human control; that while these forces may not be very appreciably operative as yet in certain states, they are beginning to modify conditions everywhere, and in the larger states are modifying them with a rapidity that will soon receive universal recognition.

A change very commonly noticed is that caused by the enormous multiplication of printed reports. At the beginning of the nineteenth century there was but an armful of judicial reports printed in the English language outside of England itself. For a long time subsequent the cases of authority upon any given point were still so few that court and counsel could thoroughly familiarize themselves with every one of them, while a really considerable proportion of the law likely to come up in court was embodied in cases whose names were commonly known to all members of the profession with any pretentions to learning. About a hundred years ago each of the states of the Union then admitted had begun to produce a series of reports of at least the decisions of its highest court. During the nineteenth century the number of states of the American Union increased from sixteen to forty-five. Reports were also being issued in the territories and in a large number of the British Colonies. Some of the individual States of the Union moreover, as well as England and the United States, were producing reports of their inferior tribunals.

It is indeed not necessary for the practitioner, in order to ascertain all the law which is theoretically binding upon his client, to examine any reports outside of those of his own jurisdiction; but it is unsafe for him to stop there unless the statutes or reports in

his own jurisdiction are absolutely in point and controlling. Even in England, American precedents are continually cited and discussed; and in most of the United States, decisions of England and of other states, as well as those of the Federal courts, are given great weight, while those of the British North American Provinces are not entirely neglected. In the larger states like New York, as in England, the use of reports outside the jurisdiction is less common; but that is only on account of the enormous multiplication of reported decisions within the jurisdiction, so that to master the home decisions alone upon any given point is a harder task than it was to master all decisions at the time when the glory of judge-made law was at its zenith. Twenty-five years ago it was not unusual for the New York lawyer to keep in his library not only a substantially complete set of the reports of his own state and of the Federal Courts, but also a large selection of those of England as well as of some of the other American States. The private law library since then has been rapidly contracting in scope, while not diminishing in size. Even the largest offices are driven more and more to depend upon the great public or Association libraries for the complete preparation of their work, which means a decrease of efficiency where the libraries are within the lawyer's reach, and a greater decrease of efficiency where they are not. Even the keeping up of a set of reports of the various courts of a large state and of the United States is becoming an expense to be seriously considered in a city, not only in the original cost of the books but the matter of office rent. Convenient for comparison is the year 1880, when the Federal Reporter—the present compilation of current decisions of the inferior Federal Courts—began. At that time, less than twenty-five years ago, the decisions of the United States Supreme Court could all be purchased in 64 volumes, and the decisions of the lower Federal Courts up to the same date, both reported and unreported, have since been collected in a series of 30 volumes. But the decisions of the United States Supreme Court since that date fill 94 volumes, while volume 131 of the Federal Reporter is already well under way. The regular series of reports of the appellate tribunals of New York State and of the old Chancery Courts prior to the same date were contained in 368 volumes, while since then 272 additional volumes have been already issued. In 1880 the regular series of the Federal and New York State decisions required only seventy-three feet of shelf room. Now they already fill ninety-five feet additional; and this is exclusive of the various series of unofficial reports of decisions, which partly duplicate and partly supplement the series above referred to, and of the

various collections made up mainly of the decisions of the courts of first instance, of the cases elsewhere unreported or reported in abbreviated form, and of annotated cases, such as Howard's series in 69 volumes, Abbott's series in 66 volumes, the New York State Reporter in 123 volumes and still continuing, and the so-called Miscellaneous Reports in 43 volumes, a series commencing within the past twelve years and still continuing, this last series being of an official character and inflicted upon us by the state itself. All of these, and others which I have not named, must be continually consulted, and the lawyer is also being confronted continually with decisions cited from daily, weekly or monthly periodicals, and occasionally with certified copies of opinions altogether unreported. The President of the American Bar Association in 1902, in his annual address to the Association, stated that the law reports of the then past year contained 262,000 pages, and estimated that a man by reading 100 pages a day might go through them in eight years; by which time there would be new reports on hand sufficient to occupy him for fifty-six years more. A single tribunal recently established in the State of New York, and sitting in four different sections—the so-called Appellate Division of the Supreme Court—which held its first session in the month of January, 1896, has already published 95 volumes of officially reported decisions, besides writing a large number of opinions which are to be found in unofficial reports; and, as it is the highest tribunal in the state after the Court of Appeals, no lawyer pretending to any degree of efficiency in his office organization can afford to be without them. At the rate of progress which was kept up during the past year volume 500 of these reports will be reached in the year 1941. By that year at latest the lawyer will see volume 329 of the present series of reports of the highest court of New York, volume 381 of those of the Supreme Court of the United States, and volume 431 of the reports of the lower Federal courts; and other states will go the same way, in varying degree. When that day shall come, will human wealth and human patience be able to bear the burden longer?

Up to the present time the natural effects of this tropical torrent have been mitigated by the increased efficiency of the digester, but his work also is now voluminous. An annual digest of English and American decisions is now published. Those of the last year occupy, though in the briefest abstract, nearly 5,000 double column pages.

The first obvious consequence of this unintermittent flow of reported opinions is that to handle a case properly, according to

the ideas of the people who established the fame of judgemade law, requires each year a greater amount of time than it required before. Every additional opinion that bears or may possibly bear upon the case at bar must be read; and to read it involves the expenditure of an appreciable amount of time. The argument and decision of any still unsettled question, or question claimed to be unsettled, thus involves an enormously greater expenditure of time at four different points—in the preliminary preparation by counsel, in the oral argument, in the court's subsequent examination of the previous authorities preliminary to the decision, and in their discussion (when, as often, they are discussed) in the opinion which is subsequently formulated, so as to serve as future evidence of the law.

Now, on the contrary, instead of expending more time, all parties expend less. The preliminary examination of the authorities, when the case is in the hands of leading and distinguished counsel, cannot be done by them personally. If they had to do it, they could no longer accept enough business to support their families. As a general rule, even in cases of great pecuniary importance, they can carefully examine only a small proportion of the authorities, and must rely upon information derived from their law clerks or junior counsel in selecting what to read. In other cases they may not be able to read any authorities at all, nor to do any independent thinking, but take reason and precedent alike at second hand from others.

At the stage of oral argument, the old custom of allowing all the time necessary for the proper elucidation of the particular case in hand has become obsolete. It has been supplanted by rules putting an arbitrary time limit upon argument, irrespective of the case; and while it is in the discretion of the court to extend the time, this is ordinarily done only in cases of the greatest immediate importance, although the others may turn out to be the cases of the greatest ultimate importance, in determining the future course of development of the law. The highest courts indeed, like the Supreme Court of the United States and the Court of Appeals of the State of New York, allow sufficient time to cover ordinarily a sufficient statement of the facts of the case and—if it be a comparatively simple one—a fairly satisfactory outline of the arguments; but it is so impossible any longer within any practicable time limit to discuss the authorities as they used to be discussed within the professional experience of men still living, that except under exceptional circumstances experienced lawyers do not discuss authorities at all, but submit them to the court in printed briefs. Moreover, even in the court last mentioned the present liberal time limit applies only to one class of

appeals. Other appeals, including probably the majority of those which will be important in the future, are given a hearing so short as to be commonly inadequate to all purposes. In the lower appellate courts the nominal time limit is apt to be still shorter, while in actual practice some courts feel forced to discourage all oral argument whatever and practically deprive themselves of the benefit of the opportunity, so important to the true understanding and solution of a difficult enigma, of extended cross-questioning of counsel by the court.

Nor does time permit that standard of care in the subsequent examination of the case which used to be considered a prerequisite. Nothing approaching the same care can now be given. During the last year of the Chief Justiceship of John Marshall the United States Supreme Court, consisting then of seven justices, filed 39 written opinions. During the year 1903-4 the same court, with nine justices, filed 212 written opinions, besides disposing of 208 cases without opinion. During the same year the New York Court of Appeals filed 221 opinions and disposed of 419 cases without opinion. It appears from the report of a commission appointed by the Governer of New York in 1903 that in one of the appellate courts sitting in the city of New York the average number of opinions written by each judge per year was considerably more than one hundred, in addition to which he had to examine and record his concurrence with or dissent from about four hundred other opinions in cases in which he sat, and participate in the discussion of about two hundred additional cases in which no opinion was rendered. Of course allowance should be made for the fact that in Marshall's time the Supreme Court justices did much work besides sitting in the courts of first instance; but after all possible allowance on this account, the disparity is still enormous.

I believe it to be a fact that few if any of the Federal appellate courts, or similar courts in any of the larger States, can at the present time secure that assistance from counsel, allow that time for oral argument, go through that subsequent examination of the authorities, discuss and analyze the general principles of law, public policy and ethics with that thoroughness, or observe that care in formulating the arguments approved and the decision reached, which are theoretically incidental to the development of judgemade law. Certainly all these things cannot be done in more than a small proportion, if any, of the cases presenting complicated facts or novel features. The time allowed being insufficient, the character of the work upon each case, taken by itself, must and does progressively deteriorate. Very likely each appellate judge performs now more

labor, and doubtless he disposes of much more litigation, than his predecessor of half a century ago. Considering the amount that he disposes of, he generally approximates surprisingly well to the right decision in the particular case; thus probably doing more good on the whole than his predecessor, who could do better work on each case taken by itself, but whose benefits reached a comparatively trifling number of his fellow-citizens. But a man who may not be a John Marshall to begin with,* and who cannot give to a single case the time which John Marshall would have given to it had it arisen in his time, although an examination of the precedents at the present day would take many times as long as was necessary in the lifetime of John Marshall, cannot be expected to bestow on it the care which was then or for a generation thereafter considered absolutely requisite. It is too much to ask of him an opinion which, in addition to being a reasonable approximation to justice in the case before him, shall also satisfactorily serve as evidence of the law on the subject for the future. No wonder that he himself, to judge from the internal evidence of his opinions, rates the language of any young textwriter as high as he does the *dicta* of his own court; and that the latter, if terse and pithy, he quotes without much investigation as to whether they had been *obiter* or not.

Nevertheless the judges and the bar and community at large have all continued nominally to treat the doctrine of *stare decisis* as still in full force; and, with all the modern difficulties in their way, so many judges stand bravely by it that the citizen must always be prepared to have it enforced against him in a given case with a rigidity and technicality that would have been quite improbable in the days when time permitted the precise state of facts and the precise line of reasoning underlying each previous authority to be more carefully analyzed, and tacit limitations to the breadth of its statements recognized. On the other hand, as the wilderness of authorities presented upon the briefs of counsel tends every year to become more hopeless, the courts in general tend more and more to decide each case according to their own ideas of fairness as between the parties to that case, and to pass the previous authorities by in silence, or dispose of them with the general remark—one of those remarks that the recording angel is supposed to overlook—that they are not in conflict. Different men, however, are of different minds. As the time spent upon oral argument and subsequent consideration of each case tends to lessen, the chances of difference in decision of two substantially similar cases coming before different sets of judges,

*I do not go into the question of the ability and learning of the judge elected under present political conditions, as compared with his predecessors.

or even before the same judge in different years, tends to increase. Apparent conflicts of authority thus arise. Subtle distinctions are taken in order to reconcile the conflict if possible. The law is thrown into doubt, and a lawyer thereafter cannot advise his client how to act in order to enjoy his rights and keep out of harassing litigation. The point in conflict reaches the court perhaps again and again, and distinctions grow subtler and subtler, until once in a while a happy solution is found by holding that some then comparatively recent case, although avowedly but distinguishing the earlier ones in some incomprehensible manner, really overruled them. Thus for a moment the doctrine of *stare decisis* fails to operate, and by its failure the law is clarified, reason triumphs, useless litigation ends, and the citizen learns how in one contingency to protect his rights.

Various plans for cutting down the bulk of the current reports have been under discussion for the past twenty years, but up to this time none has been found to which the objections raised have not been sufficient to prevent any effective propaganda.

It has been suggested that the reporting of dissenting opinions be forbidden. But these are often of great value in showing the exact scope of a decision, and when the court is nearly equally balanced they may be almost as weighty as the prevailing opinions in the courts of other jurisdictions.

It has been suggested that the judges designate which opinions shall be officially published, and that they restrict the publication within narrow limits. But opinions are public records. The bar insists upon their right to cite cases, whether reported or unreported in the official series. Often the cases thus unreported turn out to be among the most important precedents. It has always been and still is common for the judges to exercise this power, but the usual result is that the profession have to subscribe to an unofficial series of printed reports, and occasionally pay for certified copies of unprinted cases. A committee of the American Bar Association in 1898 reported that the power to determine which of their own decisions could be thereafter cited, and which should apply only to the case of the parties litigant then before them, was too dangerous a one to be confided to any court.

It has been suggested that the judges write fewer opinions, but this would be a partial abandonment of the very advantage which we have been taught to believe that we possess over the lawyers and litigants under other systems of jurisprudence. One of the functions of the judicial opinion is to help preserve the confidence of the bar and the public in the ability, learning, fairness and openmindedness of the judiciary as a whole, as well as the careful attention due to

the particular case, by indicating the grounds upon which the decision is based whenever the case is one not entirely clear. Our bar generally prize the custom and would object to its abandonment. Its abandonment would tend to diminish that confidence in the courts which is one of the cornerstones of our governmental system. Moreover, I think that every step toward the abandonment of opinion writing would be a step away from the doing of justice in the individual cases before the courts. It is a fact whose knowledge is not confined to the bar, that the result of investigation of a difficult problem must be subjected to the test of setting the facts and reasoning down in ink, before the investigator himself can rest with confidence upon his own work. Formulation in writing of the reasoning in support of a decision that has been made leads not seldom to the discovery by the writer that the decision is wrong. A court which as a general rule writes a careful opinion upon every appeal, like the Supreme Court of the United States, shows a greater proportion of reversals; and this, I think, is because the natural tendency of an appellate court at first presentation of a case is usually to affirm, both from the presumption in favor of the decision below and because, when that decision is erroneous, it is generally so because the superficial first impression of the case was followed without getting down to the bottom of it. Just as there is a conflict between the dispatch of business and the administration of justice, so there is often a conflict between the interests of the parties actually present before the court, which call for an explanation, and the interests of the clients and lawyers of the future, which are better subserved by silence.

It has been suggested that the individual judges make their opinions terser and less ambiguous, drop out all padding, reduce to a minimum the discussion of and quotation from previous authorities,* and cease altogether from expressing views upon subjects not absolutely necessary to the decision of the case in hand. That is a reform that undoubtedly ought to be made; but to expect it is hopeless. Few men seem to have the faculty of expressing themselves tersely and confining themselves to the point; and of these few men the majority have not the other qualities necessary to the attainment of public office. Nor can the public be expected to discipline even the worst judicial offenders. These are quite as likely as any to receive promotion or unanimous reëlection. There are too many other elements to be considered in estimating the judicial personality.

*It is important that the custom of citing precedents by title should be preserved, because the most convenient means of ascertaining what has been decided upon any point is very commonly through the "Table of Cases Cited."

Nor can discipline in this matter be expected from the Chief Justice or other members of the tribunal. A man's style is too personal a matter. It is all that an appellate court can do to approximate to unanimity in its decisions. The small amount of time that it has to devote to the form in which its work is given to the public is shown by the occasional long tenure of office under the highest courts of grossly incompetent reporters.

I have not found any practicable suggestion toward materially reducing the mass of current judicial literature, although legislation might conceivably reduce to a comparatively small compass the judicial literature of the past, without depriving us altogether of the benefits of our judicial law. A statute is very often enacted for the sole purpose of repealing the rule of law established by some particular judicial decision. Such a statute is never accompanied by a repealing clause, expressly declaring the case to be not the law; but conceivably it might be. Conceivably a statute might officially declare that the rule of *stare decisis* should not apply to a given reported case, because it is disapproved or has been overruled; or that the case should not be cited because it is obsolete or of insufficient importance. England has published an official edition of her statutes so far as they are now recognized as remaining in force. Those not in force are officially omitted, and nobody need ever again waste time and effort over the question whether or not they are still alive. New York has this year appointed commissioners for a similar purpose. A similar process might conceivably be applied to our judicial literature, and an official list prepared of cases to which the doctrine of *stare decisis* should in future be restricted. If the plan be practicable, we can well afford to employ our highest talent for the purpose. The official list would not need declare that every case upon it were necessarily the law in all respects. But it would be accompanied by a provision forbidding the future citation of any that had been omitted on the ground that they have been officially found to be abrogated by statute, or overruled or obsolete, or dependent upon questions of fact alone, or mere useless repetitions of rules otherwise fully settled. It may be possible that some such plan will be somewhere tried in the future in connection with a codification of the unwritten law.

Codification is the one and only remedy that has ever been suggested which amounts to more than the mildest palliative, and which has received substantial support from any influential section of the profession and the public. Fifty years ago it seemed in fair way of accomplishment, and as late as 1886 the American Bar Association, after a long debate, adopted by a small majority a resolution that

the law itself should be reduced, so far as its substantive principles are settled, to the form of a statute. The committee reporting in support of this resolution said that whatever has heretofore been settled by the decisions of the courts should be evidenced by codification, leaving to the courts to continue the natural development of the law. A majority of the influential American lawyers, however, have continued to oppose a codification of the law, and have succeeded in preventing even its serious consideration. At about the time of the favorable action of the American Bar Association, the New York City Bar Association defeated by a large majority even so conservative a proposition as that the present English system of codifying the unwritten law upon special subjects, one at a time, be taken up.

The main real obstacle to codification in America is undoubtedly the experience which we have had of codification in particular, and of statutory law in general, in the past. The inartisticality, clumsiness, obscurity and verbiage of the ancient English statute is proverbial. The old-fashioned lawyer held all statutes in contempt. The ancient form was inherited by America; and, while from early days noted examples of clear and skilful drafting were incorporated in our statute books, nevertheless the art was one little cultivated, and there remained much ground for the common saying that, however obscure the unwritten law might be, the written law would always be worse still; that the flexibility—a somewhat doubtful matter—of the judge-made law would be lost, and nothing of value would come by way of compensation.

Owing to the clumsiness of the old English statute, and the consequent necessity of arbitrary judicial intervention in order to secure for it anything like a reasonable operation, the courts adopted certain rules of construction which make it very difficult to draft a statute in simple terms which shall nevertheless fulfill in all respects the wishes of the statute maker. If the courts had always construed every statute according to its plain language, probably legislators would soon have taken more care, adopted the custom of employing able counsel, and attained a degree of literary skill which would have justified a continuance of that system of construction. The experiment, however, was never tried. When a statute comes before the court its plain letter is subject to be violated by such presumptions as that the legislators did not mean to change the prior law, and that they did not intend to violate public policy (that is, the political views of the court acting *quasi*-legislatively,) and that the letter is to be subordinate to the spirit (as the spirit may appear to the judges). When by the aid of these presumptions the courts have—as they often have—thwarted the purpose and contradicted

the real intent of the legislators, the latter have sometimes submitted, and sometimes adopted additional legislation to make their purpose and intent unmistakably clear and unavoidably enforceable. Here, however, they are hampered by the custom of remedying all judicial errors by affirmative legislation, instead of by a declaratory statute annulling the obnoxious decision. If the courts introduce a series of unintended exceptions, each of these exceptions is thus made the subject of a special statute; for the custom of our statute makers, except in periods of codification, is to deal only with the particular evils that have already been experienced, making each specific case the subject of a specific statutory remedy. Thus a code originally drawn with science and art, in the form of a series of general propositions, loses its symmetry and becomes a wilderness of special instances. Then comes a recodification, entrusted to the hands of some incompetent recipient of legislative or executive favor. The codification in such hands introduces new ambiguities, the process of judical construction and legislative amendment goes on with increasing velocity, and the condition of things becomes worse in general public opinion than it was in the now forgotten days before the process of codification first commenced.

These, however, are avoidable evils. Whatever is known is capable of being expressed in clear and unambiguous language. It is perfectly possible, and to some persons it is quite easy, to draw a statute clear enough to settle every question arising within its purview except questions so unusual, or so near the border line, or so unforeseen, that under any system of law they would naturally result in litigation. Of course so many exceptions and errors and anomalies have crept into our law at present that a codification which amended anything would read a little like the chapter on irregular verbs in a grammar, but it could be done so that the present law would be far more easily discoverable than it is now, and, when discovered, just as clear; and the errors and anomalies, together with the great mass of the exceptions, ought to be corrected in a proper codification.

The main difficulty in codification is to secure the right man to do the work. "The codification must be done by the right man (which involves the proposition that until the right man is found the codification had better be let alone). * * * He must have had a long and varied practice at the bar. He must be a theorist. He must have a very broad and practical mind. He must have an eye for the minutest point of grammar or construction. He must have a very simple English style."* When an absolute monarchy is ruled

*New York State Bar Association reports, Vol. XXVI., p. 94.

by a man who is anxious to secure a codification of the laws, and is a good judge of human nature, and understands the subject well enough to know what kind of a man can best take it up, then we may expect work of the class of the Code Napoléon. In a Republic, particularly a Republic based upon the Montesquieu system of checks and balances, where the Legislature provides the job but the executive dispenses the patronage, the chances of getting the right man are remote. The ease of finding the wrong man, and the natural results thereof, are illustrated by instances so familiar that they need not be mentioned. Not only is it harder for a Republic to find the right man, but it is harder for a Republic, when he is once found, to persuade him to take up the work. A Napoleon can assure him that, if his work is on the whole well done, it will have the necessary support and will achieve practical results. In a Republic, nobody can assure him support. However conspicuously it may deserve enactment, it is very likely to be laid quietly upon the legislative shelf, or, if it is enacted in any form, to have its symmetry and its science utterly marred by illconsidered amendments. Not only is it difficult to procure the adoption of any one of the reforms necessary to make the law consistent and reasonable and just upon any subject, but if—as true codification demands—a considerable number of substantial changes in the existing law are introduced, that very fact is likely to result in the failure of the entire work. Almost every effective action of a legislative body changes the existing law, and yet, when a codification is introduced, the cry that "it changes the existing law" is generally enough to kill it.

I believe that codification will be accomplished within the lifetime of men who are already admitted to the practice of the legal profession; and I believe that either it will be accompanied by the avowed abolition of the doctrine of *stare decisis* and substitution of the Continental method of treatment of judicial decisions, or else it will be accompanied by some such legislative sifting of the reports as I have outlined by way of suggestion; but I do not believe that it will be done until the present system has become so overloaded that the American bar with substantial unanimity will decide that almost any kind of codification would be an improvement. Meanwhile the work of the future codifier is being made daily more easy; on the one hand by the multiplication of text-books in which the present law is stated with a considerable degree of terseness and approach to accuracy; and on the other hand by a continual multiplication of conflicts in authority and a continual weakening of professional respect for precedent, just because it is precedent, so that the future codifier will be less embarrassed by the difficulty which

constituted one of the weaknesses of David Dudley Field's famous Civil Code—the fear of overruling decisions which stand in the books as the law at the time when a code is drafted, although subsequently their erroneousness may be conceded and they one by one be overruled by the courts or repealed by the Legislature. I have not sufficient confidence in the official distributers of public patronage to believe that codification will emanate from persons nominated by a President or Governor and confirmed by a Senate, unless the nominations are practically dictated by the unanimous voice of the bar. I believe that the first successful American Code of Private Law will emanate from some one of our American State Bar Associations, amendment of the law at whose behest is already no infrequent occurrence. The Association will either do the work itself and afterwards force it through the Legislature of the State which shall first try the experiment, or else put through a bill for codification, dictate the appointment of the codifier, assure him support and protection, and compel some subsequent Legislature to make good the assurance.

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